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No. 82-828

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLARENCE W. ARRINGTON,
Petitioner,

vs.

THE NEW YORK TIMES COMPANY, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of New York

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In accordance with this Court's rule 22.5, this reply brief is filed on behalf of petitioner Clarence W. Arrington ("Arrington"), and responds to arguments first raised in the Brief in Opposition of The New York Times Company ("Brief in Opposition").

In summary, Arrington points out herein that under this Court's rule 20.4 the timely filing of a reargument motion below (by respondents other than The Times) tolled Arrington's time to file a certiorari petition; that because the New York Court of Appeals recognized a cause of action under the New York privacy statute against all respondents except The Times – which requested Arrington's photograph to be taken by the other respondents and then published it – the purported state law ground is inadequate to support the decision below; that the decision below was plainly based upon the first amendment; and that requiring the New York courts to uphold the federal constitutional right of privacy by recognizing Arrington's cause of action against The Times would entail permissible post-publication liability for tortious invasion of privacy, and not impermissible governmental regulation of the media.

I. THE TWO JURISDICTIONAL OBJECTIONS LACK MERIT

A. A Timely Reargument Motion by Any Party Tolls the Time for Filing a Certiorari Petition for All Parties.

The Times argues that "it is not clear that the liberality of this Court's Rule 20.4 was intended to render timely a petition for certiorari based on one party's timely request for rehearing where the petitioner himself made an untimely application for reargument...." Brief in Opposition at 2. Rule 20.4 provides in relevant part:

> [I]f a petition for rehearing is timely filed by *any party in the case*, the time for filing the petition for writ of certiorari for *all parties* (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing..." (emphasis added).

As The Times concedes (Brief in Opposition at 2), and as indicated in the petition, a timely motion for reargument was made in the New York Court of Appeals by respondents other than The Times.[1] That motion was denied on July 2, 1982. More

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1. As indicated in the order reproduced in Appendix B to the petition, Arrington's reargument motion was denied by the lower court as being untimely. While the New York Court of Appeals has authority under the express terms of its rules to permit filing of a reargument motion beyond its normal time period, *see* Rules of Practice of the Court of Appeals of the State of New York, N.Y. Admin. Code title 500, § 500.9(d) (eff. Jan. 1981); H. Cohen & A. Karger, *The Powers of the New York Court of Appeals* § 106, at 443–44 (rev. ed. 1952), and Arrington requested permission to do so, Arrington's reargument motion, as requested by The Times, was denied as being untimely.

The lower court first decided the case on April 7, 1982. (This decision is reproduced in Appendix A to the petition.) Under that court's rules, a reargument motion, if not made on or before Friday, May 7, 1982, could be made thereafter with court permission. On May 7, 1982, respondents other than The Times made their reargument motion. On Monday, May 10, 1982, Arrington made a cross-motion for reargument. *See* N.Y. Civ. Prac. Law §§ 101 & 2215 (McKinney 1972 & 1974).

Arrington's reargument motion argued that even on the basis of the lower court's April 7 decision, granting a privacy cause of action against respondents except The Times, he was entitled to proceed against The Times

than ten (10) days before the time to file the certiorari petition (Sup. Ct. R. 29.2), a motion was made in this Court to extend such time to and including November 15, 1982. As indicated in the petition, on September 21, 1982 Justice Marshall signed an order granting the extension. As provided in that order, the petition was timely filed on November 15, 1982.

B. The Decision Below was Based on the First Amendment Because the Result Cannot be Supported by an Adequate State Law Ground.

The brief filed by The Times is noteworthy for its failure to address the anomaly of the decision by the New York Court of Appeals in dismissing Arrington's claim against The Times while sustaining his claims against the other respondents. As shown in the petition, this anomaly can be explained only by the fact that the court below believed – incorrectly – that the first amendment compelled a dismissal of the claim against The Times.[2]

The Times is wrong in arguing that the nonfederal ground is independent of the first amendment. In its decision, the New York Court of Appeals stated:

> [T]his narrow reading of the statutory provisions has not been without sensitivity to the...values our State and Federal Constitutions bespeak in the area of free speech and free press (Appendix at 31).

As this quote and others cited in the petition reveal (Cert. Pet. at 7–8), "at the very least the [state] court felt compelled by what it understood to be federal constitutional considerations to construe...its own law in the manner it did."

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on the following alternative grounds: (1) as agents of The Times, liability of the other respondents would render The Times derivatively liable, or (2) because of the complaint's allegation of concerted action, all respondents were jointly and severally liable.

2. Quoting language from the decision below, Arrington has previously argued that the ruling is based on the first amendment. Petition for Writ of Certiorari at 7–8 & 10–13 ("Cert. Pet."). He respectfully refers the Court to that decision, which is reproduced in Appendix A of the petition, so that the Court may decide for itself which is the correct view.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). Thus even if state law "would have provided an adequate basis for the [decision below], the [New York Court of Appeals] did not intend to rest its decision independently on [state law] and [this Court therefore has] jurisdiction of this case." *Delaware v. Prouse*, 440 U.S. 648, 652 (1979).[3]

Because the decision below lacks "fair and substantial support" in prior New York law, as shown below, the state law ground is not adequate to support it.[4] *See Ward v. Love County*, 253 U.S. 17 (1920). "Supreme Court review cannot be evaded by a nonfederal ground 'so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question'." R. Stern & E. Gressman, *Supreme Court Practice* at 239 (quoting *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1917)).

The New York privacy statute, which is reproduced in Appendix G of the petition, prohibits use within the state of any person's "portrait or picture" for "advertising purposes or for the purposes of trade..." without prior written consent.[5] Since dissemination of news is part of "trade,"[6] *see Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467, 472–73, 178 N.Y.S. 752, 756–57 (1st Dep't 1919); *Associated Press v. United States*, 326 U.S. 1, 6–7 & 19–20 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 128 & 130–33 (1937), publication of Arrington's photograph in New York without any consent falls squarely within the terms of New York privacy statute. As this Court recognized in *Time, Inc. v. Hill*, 385

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3. The language of the decision below is sufficiently ambiguous that a *Krivda* remand or a continuance to permit application to the court below for clarification of its opinion and remittitur would be appropriate at the very least. *See California v. Krivda*, 409 U.S. 33 (1972) (*per curiam*); *Herb v. Pitcairn*, 324 U.S. 117 (1945).

4. This Court is, of course, the judge of whether or not the state law ground is adequate. *See* R. Stern & E. Gressman, *Supreme Court Practice* §3.31, at 231–32 (5th ed. 1978).

5. Arrington made it clear to the lower courts that he does not contend his photograph was used as part of an advertisement.

6. The New York privacy statute does not define "trade." Nor is a definition of that word to be found in New York's General Construction Law. *See* N.Y.Gen. Constr. Law §§10 *et seq.* (McKinney 1951) (Consol. 1980 & Cum. Supp. Dec. 1982).

U.S. 374, 381–82 (1967), the New York courts have "construed the statute . . . to authorize [in some circumstances, present here] a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent."

As shown below, well-established principles of New York privacy law provide a cause of action against The Times in this case. Yet, Arrington was granted a privacy cause of action against the other respondents, all of whom, the lower court recognized, acted at the behest of The Times, but was not granted a cause of action against The Times. Only an erroneous view of the requirements of the first amendment can explain this result. *Compare Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (publisher, but not photographer, liable for publication of private person's photograph with magazine article).

Ample New York precedents, all of which were cited to the court below, support Arrington's contention that his statutory right to privacy has been violated. *See, e.g., Sutton v. Hearst Corp.*, 277 A.D. 155 (1st Dep't 1950); *Thompson v. Close-Up, Inc.*, 277 A.D. 848 (1st Dep't 1932), *R. aff'd mem.*, 261 N.Y. 504 (1933); *Almind v. Sea Beach R. Co.*, 141 N.Y.S. 842 (2d Dep't 1913) (n.o.r.); *Spellman v. Simon & Schuster*, 3 Media. L. Rep. (BNA) 2406 (Civ. Ct. N.Y. County 1978) (n.o.r.); *Metzger v. Dell Publishing Co.*, 207 Misc. 182 (Sup. Ct. N.Y. County 1955); *Valerni v. Hearst Magazines, Inc.*, 99 N.Y.S.2d 866 (Sup. Ct. N.Y. County 1949) (n.o.r.); *Marks v. Jaffa*, 6 Misc. 290, 291–92 (N.Y. Superior Ct. 1893); *Pierrottie v. Dell Publishing Co.*, 199 F. Supp. 686 (S.D.N.Y. 1961). In *Marks*, the court stated: "No newspaper or institution, no matter how worthy, has the right to use the . . . picture of anyone . . . without consent." [7]

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7. Reliance by The Times on *Moser v. Press Publishing Co.*, 59 Misc. 78, 109 N.Y.S. 963 (Sup. Ct. Sullivan County 1908) as a case "declining to apply [the New York privacy statute] broadly to newspapers" is misplaced. Brief in Opposition at 10 n.*. In an influential decision, in and outside of New York (*see* S.H. Hofstadter & G. Horowitz, *The Right of Privacy* 45–46 (1964)), Justice Shientag in *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 782 (Sup. Ct. N.Y. County 1937) expressly disapproved of that part of *Moser* upon which The Times relies, stating:

> Some authorities have gone so far as to intimate that, apart from advertising, newspapers are altogether exempt from

In upholding a jury verdict for use of plaintiff's photograph in *Spellman*, the court stated:

> The plaintiff . . . had no connection with the subject matter of this book. Her picture was used because of her age and color for the purpose of attracting black purchasers.
>
> . . . .
>
> Any black young person's photograph could have been used.

Id. at 2407.

Similarly, in holding unlawful publication of the photograph of young boys not involved in crime to illustrate an article discussing juvenile crime, the court in *Metzger* stated:

> [Plaintiffs] were simply dragged into the article by the purely fortuitous circumstance that at the particular moment when this reporter ... appeared in their neighborhood in search of 'local color' they happened to be standing together.

207 Misc. at 185.

Indeed, the New York Court of Appeals, in a previous case, recognized that what was done to Arrington would violate the statute. *See Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359–60 (1952). In *Gautier*, the court below stated that "the individual may not be singled out and unduly featured merely because he is on the scene ...," *id.* at 359, and that "[o]ne traveling upon the public highway ... may not be picked out of a crowd alone ... and unduly featured for public view." *Id.* at 360.[8]

> the [New York privacy] statute, so far as publication in a single issue is concerned. [Citing *Moser*.] To so broad a rule, however, I do not subscribe.

8. *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971), relied on by The Times as a case where the court below rejected "a very similar claim . . . by an individual whose photograph had been used on the cover of a magazine" (Brief in Opposition at 11 n.*), is easily distinguishable. There, plaintiff, whose "practice each year [was] to attend the St. Patrick's Day Parade . . . attired in what has been regarded as typically Irish garb," had his photograph taken while attending

While New York law, as the above cases show, requires a "real relationship" between a nonpublic person and a publication of public interest to establish a first amendment privilege, and forbids singling out and unduly featuring of a person walking on a street, the court below in this case paid lipservice to those standards and proceeded to disregard them. Like the plaintiffs in *Metzger* and in *Spellman*, Arrington was dragged into the Brashler article by the fortuitous circumstance of his having been a well-dressed black person walking in the street at the time that Gorgoni, the photographer, was taking pictures on assignment for The Times. These circumstances refute any claim of a "real relationship" between Arrington and the Brashler article (Cert. Pet. at 13–16).

Thus, even if The Times were correct that the decision below rested on state law, the inadequacy of that basis unmistakably shows that the New York Court of Appeals "held as it did because it felt under compulsion of federal law . . . so to hold . . . ." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568 (quoting *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950)). By a reversal from this Court and remand, the lower court would "be relieved of that compulsion [and] freed to decide . . . [this case] according to its own local law." *Id.*

II. THE ARGUMENTS MADE BY THE TIMES AGAINST VINDICATION OF THE RIGHT OF PRIVACY IN THIS CASE ARE WRONG

The second question presented in the petition raises the issue of whether recognition of a constitutional right of privacy under the federal Constitution imposes an obligation on state courts in appropriate circumstances, present here, to vindicate such constitutional right.[9] Without challenging the Court's

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the Parade, and the photograph was then used in connection with a magazine article specifically discussing the St. Patrick's Day Parade.

9. The complaint alleged violation of Arrington's constitutional right of privacy.

jurisdiction, The Times opposes grant of the writ to consider that question on a purported lack of state action and on an argument that the constitutional right of privacy is limited to "familial areas."

While *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (emphasis added) held that protection of privacy is "left *largely* to the law of the individual states[,]" Dean Prosser has correctly pointed out that recognition of a right of privacy under the federal Constitution means that the states are not left entirely free to deny protection to privacy interests. Cert. Pet. at 10 n.9. Where, as determined by this Court, the state provides inadequate protection for a constitutionally recognized right, this Court must uphold the federal Constitution by requiring certain minimum standards that will pass constitutional muster. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). We submit that such minimum standards would require recognition of a privacy cause of action against The Times in this case.

The Times contends that Arrington's argument for a finding of state action based on application of a state rule of law (informed by first amendment considerations) to deny him a cause of action proves too much, because "every private suit in which a complaint was dismissed by the state courts would give rise to a potential constitutional claim." Brief in Opposition at 17. This argument is wrong for several reasons. Every private suit would not necessarily involve the following elements present in this case: a defendant that performs a public function and is a member of the media, which is the only organized private business that enjoys special constitutional privileges (Cert. Pet. at 20); and an issue concerning a right recognized under the federal Constitution.

The Times is also incorrect in contending that the position argued herein is devoid of case law support. Brief in Opposition at 17. Apart from the Special Term decision in this case, which held that Arrington had a constitutional right of privacy against The Times, at least two other cases, both of which are cited in the petition (Cert. Pet. at 19), have so held. *See Galella v. Onassis*, 353 F.Supp. 196, 231–33

(S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973); *Nader v. General Motors Corp.*, 57 Misc.2d 301, 305, 292 N.Y.S.2d 514, 518 (Sup. Ct. N.Y. County 1968), *aff'd on other grounds*, 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dep't 1969), *aff'd*, 25 N.Y.2d 560,307 N.Y.S.2d 647 (1970). In *Galella* the district court, relying on cases from this Court and other lower court decisions, held:

> The claim that this constitutional right [of privacy] runs only against 'state action' overlooks the fact that the act of a court—even the entry of a judgment denying relief—is state action within the meaning of the Fourteenth Amendment. [Citations omitted.] Hence, the denial of relief in this case—relief essential to vindicate a basic human and constitutional right—would itself violate the Constitution.

353 F.Supp. at 232.

Arguing that state action is absent, The Times mistakenly relies on *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), which is easily distinguishable. Applying the well-settled rule that pre-publication restraint can only be imposed on the press in extraordinary circumstances, *Tornillo* simply held that a state may not compel a newspaper to publish a statement without its consent. In contrast, post-publication liability, as for invasion of privacy, is clearly permissible. *See Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). Consistent with that, we submit that recognition of the constitutional right of privacy under the federal Constitution requires the New York courts, on the facts of this case, to grant Arrington a cause of action, thus imposing post-publication liability for tortious invasion of privacy. Moreover, while plaintiff in *Tornillo* sought to use the enormous power of the press and its fiduciary obligation to the public as bases for a governmentally regulated right of access to the media, Arrington seeks against the press a right to be left alone. No government regulation of the press is involved in the right Arrington seeks.

Without denying that a right of privacy is recognized under the federal Constitution, The Times contends that *Paul v. Davis*, 424 U.S. 693 (1976) restricted that right to "familial

areas." Brief in Opposition at 15–18. That view is clearly wrong. In *Paul v. Davis*, the Court simply held that an individual who had been arrested for shoplifting had no privacy claim because of police publication of his mug shot. This is an application of the Court's previous ruling in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) that there is no invasion of privacy resulting from disclosure of accurate information contained in public records.

That *Paul v. Davis* cannot be viewed as limiting the constitutional right of privacy to "familial areas" is shown by the fact that in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), decided after *Paul v. Davis*, the Court held that the "right of personal privacy includes 'the interest in independence in making the certain kinds of important decisions'," and that "the outer limits of this aspect of privacy have not been marked by the court...." 431 U.S. at 684.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the Court of Appeals of New York.

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